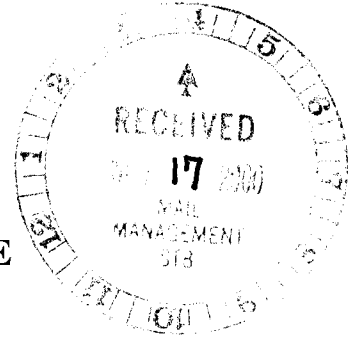


**COMMENTS OF THE
OHIO RAIL DEVELOPMENT COMMISSION
IN EX PARTE 582, (Sub No 1)
MAJOR RAIL CONSOLIDATION PROCEDURE**

November 17, 2000



The Ohio Rail Development Commission (ORDC) is the agency of the State of Ohio mandated to “develop, promote, and support safe, adequate and efficient rail service throughout the state.” As such, ORDC has been and continues to be the lead agency in Ohio for developing policies and positions regarding rail mergers.

ORDC has reviewed the decision in Ex Parte No. 582 (Sub-No. 1) Major Rail Consolidation Procedures served October 3, 2000. In that regard ORDC appreciates the summary of its previously expressed concerns which appears in Appendix H at pages 219-221. As reflected by the summary those concerns include the need for enhanced competition and access to rail service; the need for relief in bottleneck situations and increased availability of reciprocal switching; support for the Bill of Rights advocated by the American Short Line and Regional Railroad Association; the need for railroad accountability for benefits promised in merger proceedings; an urgent need for alternative dispute resolution procedures including mediation and arbitration; an increased role for the states especially in the area of environmental issues and the urgent need for adequate mitigation of environmental impacts on communities. Many of these issues have been addressed at least to some extent in the proposed rules.

ORDC appreciates the efforts of the Surface Transportation Board (STB) in

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undertaking a major revision of railroad merger regulations. We loudly applaud the STB's October 3, 2000 Notice of Proposed Rulemaking for its recognition that excess capacity has largely disappeared from Class I railroads and that "enhanced competition" needs to be a major part of the template by which the STB will evaluate whether further major consolidations will be consistent with the public interest. We further applaud the breadth and depth of the issues STB staff has undertaken to address.

ORDC welcomes the opportunity to provide further comment in the Ex Parte 582 proceedings. Our comments below address the General Policy Statement, the Proposed Technical Revisions, and Additional Areas of Concern which ORDC believes should be addressed in this proceeding.

COMMENTS ON GENERAL POLICY STATEMENT

1180.1 (c): Public Interest Consideration

In this section, STB states:

To maintain a balance in favor of the public interest, merger applications must include provisions for enhanced competition.

ORDC maintains that no truer words about the nation's rail transportation network were ever written. ORDC fully supports this policy statement and urges that it be used as a guiding principle in merger and control proceedings.

1180.1 (c)(1): Potential Benefits

In this section, the STB states that its policy would be for the merging railroads to provide in detail public benefits they believe will result from the proposed merger.

ORDC agrees that this is a good and sound policy. However it is equally important that the STB actively solicit the views of states, shippers and effected communities concerning benefits and detriments of a proposed merger or consolidation.

ORDC further believes that the STB policy needs to go a step further. Merging railroads should be responsible for comparing asserted benefits provided by the merger, to key priorities established by public bodies such as states, and to the top priorities of shippers, trade associations, and the American Short Line and Regional Railroad Association. This type of policy initiative would impel merging railroads to better interact with their constituents. Also, it would motivate states and trade groups to make hard choices as to just what their top priorities are.

1180.1(c)(2) Potential Harm

ORDC applauds the STB for recognizing the reality that potential harm from large merger transactions come from transitional service problems as well as from reduction of competition. However, it appears to ORDC that the STB solution to transitional problems is better planning. Having witnessed the service disruptions of the Conrail Acquisition process, ORDC can only comment that the best laid plans go oft astray. ORDC strongly believes that the STB policy in this regard should include a statement that the merging railroads will be responsible for reparations after the fact, as well as during transition.

1180.1(d): Conditions

ORDC again applauds the STB for recognizing that any future mega-merger must enhance competition. ORDC questions, however, putting the sole responsibility of

proposing conditions to enhance competition on the applicants. Again, ORDC maintains that the applicants by their very nature are not well equipped to determine what is most in the public interest, especially in the areas of the environment and economic development, and will propose what is for the applicants the path of least resistance. The STB should, at minimum, require applicant railroads to make good faith efforts to determine what states, rail users, and Class II and III railroads envision as effective ways to enhance competition. The STB should have a policy placing the burden of proof on the applicants that specific enhancements to competition sought by the states, communities, rail users, and small railroads would unduly impact the proposed merger. ORDC contends that the current system, and the proposed new policy, puts the burden of proof on the affected parties, not the applicant railroads. It is the railroads merger. The burden should be upon the applicant railroads and STB policy should so specify.

1180.1(e) Labor Protection

ORDC has maintained throughout the Conrail Acquisition process, and the Ex Parte 582 process, that the adverse impacts of proposed mergers fall as hard upon rail labor as on any party. The STB has sound basis for relying upon labor-management negotiations to resolve contentious issues. ORDC applauds the STB for issuing a strong policy statement on treating rail labor fairly and equitably. ORDC suggests that the STB strengthen its policy statement on labor protection to include a provision that the STB will ensure that the safety of rail labor will be in no way compromised by a proposed rail merger.

1180.1(f): Environment and Safety

ORDC strongly believes that the negotiation process is NOT a fair and effective platform on which to base STB policy for mergers. Ohio has been left to deal with serious adverse impacts following the Conrail Acquisition process. As a result it has little faith in a policy statement which recommends one on one negotiations as its center piece. Negotiations were the basis of the Conrail Acquisition environmental proceedings. One result was that Ohio taxpayers are now strapped with \$180 million in costs over the next 10 years to build new overpasses, primarily to alleviate blocked crossing problems caused by the Conrail transaction. In Cleveland, which did through a Herculean effort win many concessions, it is becoming apparent attempts to resolve environmental issues through negotiation are fraught with difficulty as the City discovers new noise and pollution issues it had not envisioned during the Conrail proceedings.

ORDC believes that the environmental issues are simply too complex and obtuse for many communities, and even for state agencies, to handle effectively without help. ORDC believes that negotiations between the railroads and communities can play an important role in the final solution to environmental issues but that this type of negotiation is intrinsically biased toward the railroads.

Further, ORDC contends that the idea that environmental issues can be adequately resolved BEFORE the merger is implemented is specious. The merging railroads, and local communities, are just not that good at predicting the future to take care of all environmental issues beforehand. Ohio has seen areas where train traffic has increased far more than projected as well as cases where rail traffic has not yet reached

expected levels. The City of Cleveland has correctly pointed out that true environmental impacts are not known until well after trains start running.

The STB should make clear in its policy statement, that, given the resources by Congress, the STB will make mediators available to all parties throughout the environmental review process. ORDC strongly believes ongoing mediation will effectively bring parties to mutually acceptable solutions to most environmental issues thus avoiding expensive and burdensome filings during consideration of the merits of a merger proposal. Just as strongly, ORDC believes the existing system of formal STB filings and proceedings to determine environmental issues is fundamentally flawed and limits access by small shippers and railroads.

1180.1(h) Service Assurance and Operational Monitoring

ORDC supports the STB's addition of this new rule/policy. Clearly we must all learn from the problems recent mergers have caused for shippers and small railroads. ORDC believes that the additional planning and oversight envisioned by this new policy will help us to avoid some of the mistakes of the past. We also believe that the proposed Service Council will be a valuable tool in making future transitions proceed more smoothly.

ORDC, however, does not believe that the new policy statement goes far enough. For all the new emphasis on more planning and oversight, the basis of the proposed policy is still good faith negotiations between merging railroads and shippers and between merging railroads and small railroads. ORDC contends that many shippers, especially small or captive shippers, and virtually all small railroads, are at a huge

disadvantage in this system.

ORDC believes that the STB should incorporate an idea CSX put forth in its preliminary Ex Parte 582 comments called a "field mediation system" into its policy on service assurance. (While the CSX proposal only related to small shippers, ORDC believes it should be expanded to incorporate small railroads, states, and communities). The mediation would be conducted by outside mediators supervised by the STB. ORDC believes that mediation should be mandatory for applicant railroads but not mandatory or binding for non-railroad entities. The purpose of the mediation would be to negotiate a fair resolution and to avoid formal litigation.

Further, ORDC believes that the STB should include in this policy statement an affirmation that the tenants of the Short Line Bill of Rights would, by definition, be issues which would be subject to mediation between small railroads and merger applicants. Calling for mediation of such problems would merely be a small step toward equity for small railroads.

PROPOSED TECHNICAL REVISIONS

1180.4(b)(4): Prefiling Notification

ORDC believes that it is a very good idea to require that merging railroads supply 100% data tapes under proper protective orders. ORDC witnessed the waste of tens of thousands of dollars during the Conrail Acquisition analyzing 1% waybill data. ORDC found the 1% data to be sorely lacking in relevance to the proposed transaction. The

availability of 100% data during the Conrail transaction would have been very valuable in evaluating such concepts as the ill fated "flip flop" of tracks in Cleveland (i.e. the proposal to have NS take the tracks originally designated for CSX and vice-versa with an expensive flyover at the heart of Conrail's "Big X" in Berea.) and other issues related to traffic routings.

1180.6(b)(9): Employee Impact Exhibit

ORDC agrees with the STB that better accounting of employee impacts are needed. ORDC applauds the attempt to quantify "Jobs Transferred". We believe that the impacts of disruption on families is never fully accounted for in the merger process. ORDC believes that precipitous cut backs in front line management can be detrimental to rail operations in general, and could result in poor service to rail users, and to short line partners.

ORDC's experience is that NS and CSX are both very good at resolving service issues with rail shippers and small railroads.....when they can apply the resources needed to deal with specific problems. The problem as we see it is that CSX and NS too often do not have the people or the time to deal with what are to them minor issues. ORDC has sometimes acted as an intermediary when there are Class I service problems adversely impacting a small railroad. We have found both CSX and NS management responsive to such problems and commend their efforts.

1180.6(b)(10): Conditions to Mitigate and Offset Merger Harms

ORDC believes that the simple statement in part (ii) - *"Applicants must explain*

how the transaction and conditions they propose will enhance competition and improve service." - is woefully inadequate to meet the policy goal established in 1180.1. As we argued above, ORDC believes that solely relying on the applicant railroads to provide ways to enhance competition will not adequately take into account relevant priorities and concerns of communities, rail users, rail labor, small railroads, as well as the environmental and economic development priorities of the states.

180.6(b)(11): Calculating Public Benefits

ORDC strongly agrees with the STB that applicant railroads should be responsible for presenting and quantifying benefits and detriments of the proposed transaction.

However, we believe that the STB should add much more detail to its 1180.6(b)(11) procedure. ORDC encourages the STB to require the applicants to specify in detail their measurement systems through which the benefits and detriments were quantified so that the STB and other parties can assess whether such benefits will actually occur. In addition, ORDC encourages the STB to specify the categories of benefits and detriments which the applicant railroads need to address. ORDC believes the benefit and detriment categories should include but not be limited to the following:

Benefits

- * Increased capacity in multi-modal shipping corridors.
- * Increased capacity for intercity and commuter rail passenger services.
- * Better service/reduced rates for intermodal shippers due to improved access to ports and terminals.
- * Reduced noise and environmental impacts from reduction of trains on routes.

- * Reduced rates for shippers from such efficiencies as decreased car ownership and maintenance costs due to quicker car turn-around or heavier loadings and other such savings.
- * Reduced rates for carload shippers from the efficiencies of longer single line hauls and from improved access to terminals and ports.
- * Reduced rates to shippers attributable to enhanced competition resulting from a merger.
- * Increased viability for connecting railroads due to better access to terminals, gateways, and ports, including the elimination of paper barriers.
- * Increased viability for connecting railroads due to better efficiency of the applicant railroad in such areas as faster car turn-around, expanded car supply, and related areas.
- * Increased viability for connecting carriers from the efficiencies of longer single line connecting hauls.
- * Improvements for communities from the reduction of blocked crossings, reduction of noise and pollution, reduction of hazardous materials moving through towns and related issues.

Detriments

- * Loss of freight and passenger capacity due to congestion and inadequate infrastructure.
- * Increased energy use from running of additional trains.
- * Increased Blocked Crossings due to increased train traffic.
- * Increased pollution and noise and other adverse impacts on lines where traffic will increase.

- * Increased environmental problems near yards and intermodal terminals where usage will increase.
- * Higher rates or reduced quality of service for shippers due to the loss of competitive options.
- * Lost business for connecting railroads due to the loss of competitive options and connections.
- * Loss of business for shippers due to loss of direct service or competitive options.
- * Increased costs for connecting railroads due to merger related decisions to increase train lengths, increase car weights, reduce crews serving interchange points, and related actions.
- * Constraints on shippers flexibility because of minimum tender limitations.

1180.6(b)(12): Downstream Merger Applications

ORDC commends the STB for discarding the “one case at a time policy” and recognizing that the next mega-merger will set off a chain reaction resulting in two major transcontinental railroads in the US and Canada in the short term, with mergers with Mexican railroads a likely follow up. ORDC believes that the STB has taken on a great challenge, turning speculation about the follow up mergers into positive STB actions in a case at hand.

ORDC has great difficulty discerning how the downstream process will play out until the follow up plans are actually announced. For example, suppose Burlington Northern/Sante Fe and Canadian National re-initiate their plans to merge. Clearly, a very likely next step for the BN/CN would be one last merger with either NS or CSX

leaving a combination of Union Pacific, Canadian Pacific, and either CSX or NS the logical counter move. However, until two mega-railroads emerge with certainty, the permutations of downstream impacts could be overwhelming. Carrying the BN/CN case a bit further, how could UP or CP react until they knew whether the BN/CN's final merger would be with NS or CSX?

Conversely, if the Big Six do know who their final merger partners will be, what is the point of a two or three step merger process? In a multi-step process, how would the STB or other federal and state agencies evaluate transportation planning and policy on a transcontinental basis, especially in regard to multi-modal corridor capacity, efficiency, and national defense?

The upcoming round of mergers is likely to determine the railroad map for North America for the next 100 years. ORDC contends that North America would be better off if the Big Six railroads came forward at once with a proposed "Final Solution" and the STB and its Canadian and Mexican counterparts took as long as was needed to sufficiently analyze the results. We recognize that this is probably beyond the scope of Ex Parte 582, and current statutory constraints on the decision process. ORDC believes that the stakes for all concerned are sufficiently high that provision for thorough evaluation of future ramifications should not be constrained by current time limitations.

ADDITIONAL AREAS OF CONCERN

Direction of Ex Parte 582

ORDC applauds the STB on the positive adjustments it has proposed for the

merger analysis process. The new proposals push applicant railroads to better analyze merger related impacts including enhancements to competition. They recognize downstream reactions and the ongoing nature of environmental and rail service and important infrastructure issues. ORDC believes that it is essential for STB to carefully consider adequacy of car supply, motive power and skilled employees to assure adequate safety and service. In that regard ORDC urges that STB should seek an independent evaluation of these critical issues by the Federal Railroad Administration and/or qualified independent consultants. New ideas such as the Service Council are to be commended. In sum, the new proposals greatly improve up front and ongoing merger planning, implementation planning, and safety planning. ORDC recognizes all these efforts as positive strides forward.

While Class I railroads may argue that the new STB proposals are unnecessarily arduous, ORDC contends that the railroads past performances in mergers prove that expanded planning, phased implementation reporting and analyses are amply warranted. ORDC contends, however, that the increasingly complex merger evaluation process is not only arduous for the applicant railroads, but for communities, rail users, rail labor, small railroads and states as well. Continued STB oversight over of virtually all areas of a merger for a five year period means that other parties involved must be constantly vigilant for a protracted period of time. Concepts such as the Service Council would formalize this vigilance for many parties. ORDC recognizes that some of the concepts we have proposed herein such as delaying final environmental evaluation until railroad operations are normalized would further add to the burdens of those who must

continually monitor the impacts of mergers.

For the adversely impacted communities, rail users, rail labor, small railroads, and states, the next round of mega-mergers could be like a proverbial Sisyphean task of constantly pushing a boulder up the hill only to have it roll down to the other side. Why should those adversely impacted by a merger have the added detriment of keeping up with the STB process for four or five years? Ohio's experience is that once the STB decision is final, those who have lost have precious little incentive to renew the uphill battle regardless of the severity of merger related problems which have arisen.

ORDC's point in raising this issue is that negatively impacted communities, rail users, small railroads, and even states could use a helping hand from the STB to simplify their respective parts in the merger process. The sections below present ideas about mediation and STB public counsel which we believe could be that helping hand.

Need for More Mediation

Ohio's experience has been that in many merger related confrontations, the parties involved tend to see issues in black or white with precious little grey in-between. Throughout the Conrail Acquisition process, ORDC did not witness any negotiation which was tempered by an impartial mediator. Rather, ORDC witnessed railroad officials who were in many instances unsympathetic to community and shipper needs; and local and shipper officials who did not comprehend the perspective of the railroad responsible for moving interstate commerce and running an efficient business.

ORDC contends that with all the positive new elements the STB has added to the proposed new merger rules, the STB still relies overwhelmingly on negotiated solutions.

ORDC does not see changes in the nature of railroads, communities, shippers, rail labor, and small railroads that would make voluntary negotiations in the next round of mergers any more effective as a means for resolving issues than they were in the last rounds. Neither does ORDC foresee a fundamental change in human nature that would broaden the perspectives of contesting parties to encompass the gray areas of important issues.

Therefore, ORDC requests that the STB formally incorporate mediation into the merger process. ORDC believes that STB supplied mediators would be optimal, but understands that the concept of outside mediators under the direction of the STB would be more cost effective. ORDC believes that mediation should be mandatory for the applicant railroads, but voluntary (though strongly encouraged) for other parties. ORDC believes that mediation, be it binding or non-binding upon the railroads (ORDC believes it should not be binding on non-railroad entities) would greatly reduce the burdens on communities, shippers, small railroads, rail labor and states as well as the STB and the applicant railroads in a merger process. ORDC also believes that mediation would facilitate mutually acceptable resolutions of issues that would then not have to be dealt with in a formal decision.

Need for STB Office of Public Council

ORDC contends that the STB could itself be the best resource in directing parties to acceptable compromises. Though it may be an issue for Congressional consideration rather than STB rulemaking, ORDC believes that STB should have a fully staffed office which could assist entities who believe that they will be adversely impacted by a proposed

merger. While the existing Office of Congressional and Public Services has been of great assistance to ORDC when we have used its services, that office is simply too small to be a key component of a mega-merger. ORDC envisions a fully staffed office as called for in PL 94-210, the Railroad Revitalization Act. ORDC firmly believes that guidance from STB experts would be invaluable in leading parties to fruitful negotiations or mediation and, when deemed appropriate, in representing the interest of small shippers or communities in the interest of developing an adequate record.

Impacts of Unregulated Joint Route Agreements

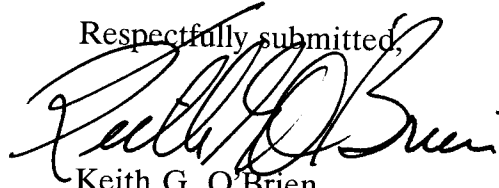
ORDC believes that it is possible that Class I railroads will find it in their best interests to bypass the STB's new merger procedures and, as the STB proposed rules themselves encourage, seek to gain the benefits of mergers without the formal joining together. A November 2, 2000 news item on the "Trains On Line" news wire quoted CSX Chairman John Snow as saying: "If you can't do it (improve efficiency) through mergers, it puts more pressure on us to create alliances. I think all railroads pretty much see it that way."

ORDC believes that the STB should take a hard look at the "alliance" issue. Such alliances have the potential of creating great benefits in capacity and efficiency as well as adverse impacts just as mergers can do. For instance, ORDC can easily foresee transcontinental alliances greatly increasing the number of trains on certain track segments. The negative impacts and benefits of an alliance can be the same as those resulting from a merger.

CONCLUSION

ORDC appreciates the opportunity to participate in these important proceedings and hope that its views will contribute meaningfully to adoptions of new policies and rules that will work in the best interest of all concerned.

Respectfully submitted,


A handwritten signature in black ink, appearing to read "Keith G. O'Brien", is written over the typed name.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 17th day of
November, 2000, served a copy of the forgoing on all known
parties of record by first class U.S. Mail postage prepaid.


Keith G. O'Brien